

MAR 28 1945

IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

No. 10.13 - 1015

ROBERT R. HARE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

JOHN M. HARE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

CLINTON L. HARE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN
SUPPORT OF PETITION.**

DANIEL S. RING,

1737 H Street, N. W.,
Washington 6, D. C.

C. LEO DEORSEY,

401 National Savings & Trust
Building,
Washington, D. C.

Attorneys for Petitioners.



INDEX.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved.....	1
Substantive counts	3
The conspiracy count	5
Jurisdictional statement	9
Questions presented	9
Reasons relied on for allowance of writ.....	9
Prayer for writ	11
Brief in support of petition for writ of certiorari.....	13
Opinion of court below	13
Jurisdiction	14
Statement of the case	14
Specification of errors	15
Argument	16
Point A	16
Point B	30
Point C	34
Conclusion	37

TABLE OF CASES AND AUTHORITIES.

Clyatt v. United States, 197 U. S. 207.....	9, 21, 22
Grantello v. United States, 3 F. (2d) 117.....	10, 21, 22, 30
Gunning v. Cooley, 281 U. S. 90	9
Haning v. United States, 21 F. (2d) 508.....	11
Hubby v. United States, 150 F. (2d) 165.....	10, 27
Leslie v. United States, 43 F. (2d) 288.....	10, 30
Nicola v. United States, 72 F. (2d) 780.....	10, 22
Paddock v. United States, 79 F. (2d) 872.....	10
Pettibone v. United States, 148 U. S. 203.....	26

	Page
Terry v. United States, 7 F. (2d) 28.....	10, 27, 32
Towbin v. United States, 93 F. (2d) 861.....	10
United States v. Lancaster, 44 F. 896	33
United States v. Richards, 149 F. 443.....	33
Ventimiglio v. United States, 61 F. (2d) 619.....	10, 27
Vinciguerra v. United States, 21 F. (2d) 508.....	11

OTHER AUTHORITIES.

Corpus Juris, 16 C. J. 763	30
Supreme Court Rule 38, par. (5) (b)	14

TABLE OF STATUTES CITED.

Emergency Price Control Act, 56 U. S. C. A., App. Secs. 901-946	2
Judicial Code, Sec. 240(a), 28 U. S. C. 347.....	14

IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

No.

ROBERT R. HARE,
Petitioner and Appellant Below,
vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee Below.

JOHN M. HARE,
Petitioner and Appellant Below,
vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee Below.

CLINTON L. HARE,
Petitioner and Appellant Below,
vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRITS OF CERTIORARI.

*To the Honorable Harlan Fiske Stone, Chief Justice of
the United States, and the Associate Justices of the
Supreme Court of the United States:*

Your petitioners respectfully show:

SUMMARY STATEMENT OF MATTER INVOLVED.

The issues here involved relate to denial of motions for a directed verdict and to denial of motions for arrest of judgment.

Your petitioners, together with J. C. Perry and Company, an Indiana wholesale grocery corporation, of which they were the officers, and Russell P. Rozelle, a salesman, were charged in an indictment returned March 16, 1945, in the District Court of the United States for the Southern District of Indiana, before District Judge Robert C. Baltzell, with violations of the Emergency Price Control Act (56 U. S. C. A., App. Secs. 901-946) (R. 1-11).

The indictment was in six counts—five charging sale of liquor at wholesale in excess of ceiling prices, and one charging conspiracy so to sell.

Rozelle pleaded guilty. The other four defendants pleaded not guilty and went to trial before a jury (R. 15).

At the close of all evidence in the case separate and several motions were made for a directed verdict of not guilty (R. 147, 148). The trial court took these motions under advisement and the case went to the jury, which returned a verdict of not guilty for the corporation and guilty on all counts with respect to each individual defendant below (R. 148).

Your petitioners then seasonably filed separate and several motions in arrest of judgment (R. 149, 150).

The trial court passed on the motions for a directed verdict and those in arrest of judgment at the same time, overruling the same, to which rulings your petitioners, defendants below, separately and severally excepted (R. 151, 152).

Robert R. Hare was sentenced to a total of three years' imprisonment; John M. Hare to two years' imprisonment; Clinton L. Hare to a year and a day's imprisonment; and each was fined \$25,000, being \$10,000 on the conspiracy count and \$3,000 on each of the other five counts, cumulatively (R. 152-155).

An appeal was taken to the Seventh Circuit Court of Appeals and the judgment below was affirmed on February 8, 1946 (R. 204, 205, 206).

Petition for rehearing was denied February 26, 1946 (R. 279). Mandate was stayed pending action on this petition.

Substantive Counts.

The first five counts of the indictment laid substantive offenses, all in the state of Indiana, specifying sale of a total of 241 cases of whiskey, on which the wholesale ceiling price was \$7,417.54, for a total price of \$11,641.00 (R. 1-5).

To support the charges of the first five counts, the government called eight witnesses. Five of these were purchasers of the liquor described in the first five counts of the indictment; one was the shipping clerk at J. C. Perry and Company; Rozelle, the salesman; and a man named Daniel W. Jones, who accompanied Rozelle during the transactions alleged.

It was admitted by defendants below during the trial that all whiskey entering into the case was the property of J. C. Perry and Company and was delivered by J. C. Perry and Company, a defendant, to the purchasers. Wholesale ceiling prices were admitted by stipulation (R. 20-22).

The same general pattern of testimony was adduced for all of the five substantive counts (R. 23-31). This was to the following effect:

That Rozelle, calling upon his trade in the state of Indiana and accompanied by Jones, indicated to customers that he could procure whiskey but that it would cost more than the ceiling price. An arrangement was made whereby the whiskey would be cleared through J. C. Perry and Company, which would invoice the same, deliver it and receive therefor the ceiling price. The money over and above the ceiling price was required to be paid to Jones, who accompanied Rozelle as the ostensible owner of the whiskey. All transactions involved were between Rozelle, Jones and the five purchasers.

The only testimony connecting defendants other than the company and the salesman, Rozelle, with these transactions was given by Rozelle, and since this testimony provides the gravamen of the petitioners' case, it is here repeated in some detail.

(1) The trial court asked witness Rozelle what he did with the excess that was collected on the "sales in the state of Indiana" (R. 76). No immediate answer was made by witness to the court's inquiry (see balance R. 76), but witness later, however, testified (R. 77) that the over ceiling portion of the money collected on "the Indiana sales" was taken down to J. C. Perry and Company in Indianapolis, where "Mr. Hare" (referring to petitioner, Robert R. Hare) told Rozelle to handle it, and he, Rozelle, put it in envelopes and handed it to the cashier to put in the vault. When he got ready he (meaning Rozelle) would cut it up or pay off (R. 77).

Referring to payment of expenses and in explaining how this was done, witness stated (R. 77) that after "they" had paid for all the whiskey, merchandise and everything "they" would divide the profit, that he would go back to the cage and if there were \$2,000 profit, he would cut each one, Robert, Clinton and John Hare, for \$500 and keep \$500 for himself.

(2) Rozelle testified (R. 82) that in the spring of 1944, John (referring to petitioner, John M. Hare) got some of the "Indiana" money, but witness doesn't know when.

(3) Rozelle testified (R. 82) on redirect examination that he did distribute some of the excess over ceiling prices collected on "the Indiana sales" and gave at different times a total of probably \$2,500 to John, Clinton and Robert Hare "from the Indiana sales of the 1,500 cases." This was \$2,500 apiece.

The first point of confusion enters the case when the phrase "Indiana sales" is used without relating the same

to those Indiana sales which were the subject matter of the first five counts.

To support the first five counts of the indictment, involving, as aforesaid, a total of 241 cases, the five purchasers testified to the purchase of a total of 420 cases, of which 75 cases was whiskey of a description different from that alleged in the count concerned (R. 23-31).

Even including these 75 cases in the testimony supporting the first five counts of the indictment, the total price testified to for the 420 cases amounted to \$20,053.00, on which a ceiling of \$12,897.09 applied (R. 23-31).

Two Indiana transactions were introduced which had no relation to the first five counts of the indictment, but supported, as overt acts, the conspiracy count. These two Indiana transactions amounted to 732 cases of whiskey, with a total price alleged to have been paid in the sum of \$35,336.00 for whiskey on which a ceiling of \$21,634.00 was in effect (R. 31-35).

Thus, when "Indiana sales" were referred to, the term encompassed transactions totaling about 1,150 cases of whiskey sold, according to the testimony of the purchasers, for \$55,389.00 when the ceiling was \$34,531.09 (R. 23-35). The amount over ceiling was \$20,857.91.

Had a less general and more specific definition been used in the testimony, namely "sales under the first five counts of the indictment" (which were "Indiana sales," it is true, but barely a third of all "Indiana sales" in dollar volume) such a term would have encompassed sale of not more than 420 cases of whiskey for a total of \$20,053.00, with a ceiling of \$12,987.09, leaving the amount over ceiling at \$7,155.91 (R. 23-31).

The Conspiracy Count.

The conspiracy count charged that the five defendants aforesaid conspired within the Southern District of Indiana and within other judicial districts of the United States to

sell and supply distilled spirits at prices higher than the lawful ceiling, and alleged fifteen overt acts occurring in Ohio, Indiana and Kentucky (R. 6-10).

Seven of the fifteen overt acts (VII-XIII, R. 9, 10) concerned dealings with purchasers named in the first five counts, and five of the overt acts (IX-XIII, R. 9, 10) had reference to the identical whiskey sales alleged in the first five counts. The testimony supporting the conspiracy count came principally from Rozelle, who stated he made contact with one Frank Clark of Ohio, a representative of tavern keepers who had formed a pool of retail liquor dispensers for the purpose of procuring whiskey for sale at retail in the state of Ohio (R. 72). The Ohio liquor department permitted this method of procuring whiskey to be shipped into Ohio from other states, although Ohio maintained a monopoly on the handling of liquor (R. 68).

The members of the pool placed in the hands of Clark large sums of money to be used by him in locating and procuring whiskey for them (R. 72, 73). This was during 1943, when nothing appeared in the regulations making it unlawful to take commissions, finder's fees, etc., for services in locating and procuring whiskey.

Clark, after contacting Rozelle, made arrangements whereby J. C. Perry and Company during the year 1943 sold to the members of the pool whiskey which was delivered through the Ohio department. Funds which the members of the pool had placed with Clark paid for the whiskey. J. C. Perry and Company received the ceiling price and no more, and the whiskey was delivered by the company through the Ohio department.

In the transactions, Clark received from the tavern keepers a total of from \$175,000 to \$180,000 over and above the amount required to pay J. C. Perry and Company for the whiskey. Of this additional money, Clark gave Rozelle \$168,000 and Rozelle, in turn, divided this money so that each of your three petitioners and Rozelle received \$42,000 (R. 78, 79).

During these transactions, Rozelle testified, Robert Hare, Secretary of J. C. Perry and Company, accompanied him on the first visit to see Clark, at which time the arrangements for the sale were consummated (R. 72, 73). Clark testified that Robert Hare consulted with him concerning the transactions involved about three times (R. 63).

Testimony was also introduced to the effect that Robert Hare, as Secretary of J. C. Perry and Company, by letter dated May 12, 1943, but not written and mailed until September, 1943, appointed Clark agent for J. C. Perry and Company in Ohio (R. 64, 67).

Rozelle testified further, supported by his wife, that John Hare one night took a package containing \$92,500 wrapped in paper, which Rozelle said represented proceeds from Ohio transactions delivered to him by Clark, and kept it over night, returning the package to Rozelle the following morning (R. 73).

Robert R. Hare, John M. Hare and Clinton L. Hare, your petitioners, admitted on the stand that they received \$42,000 from the proceeds of the Ohio transactions, in the belief that the same was finder's fees or commissions (R. 95, 102, 103, 110, 122).

The evidence in support of other phases of the conspiracy was as follows:

During the year 1943, a Mr. McBride living in Ohio went to Louisville, Kentucky, to procure whiskey (R. 42). A Mr. Potlitzer, who had been a representative of distillers and who had sold J. C. Perry and Company 100 barrels of bulk whiskey before the ceiling price was placed upon the same, knew that J. C. Perry and Company had decided to sell this whiskey (R. 36). Potlitzer and McBride met either directly or through others, and Potlitzer notified J. C. Perry and Company that if the company would send the warehouse receipts properly endorsed to Louisville, Kentucky, he had a purchaser for the 100 barrels of whiskey then owned by J. C. Perry and Company (R. 36). J. C. Perry and Company, through its manager, Robert Hare, endorsed

the certificates and sent them to Louisville, Kentucky, by Rozelle, where they were transferred to McBride (R. 75). J. C. Perry and Company received for this whiskey \$5,904.73, which was the ceiling price. The evidence shows that McBride from time to time furnished his agents a total of \$36,000 with which to procure whiskey, and the only whiskey which he received was the 100 barrels of bulk whiskey. The evidence shows that a number of people who engaged in the transaction received parts of the difference between the sale price of \$5,904.73 which J. C. Perry and Company received and \$36,000 which Mr. McBride gave to his agents. Rozelle testified he delivered \$30,000 from this transaction to Mr. Robert Hare (R. 75, 76).

The government's case was predicated on the theory that in both the substantive counts and in the conspiracy, the company was primarily responsible. The case was tried on the theory that the company owned the whiskey (R. 71); that the company sold and supplied the whiskey (R. 71); that the proceeds alleged to be over ceiling charges were kept in the company's vault under the supervision of a company employee (R. 77); that the company appointed Clark as its agent (R. 55) in pursuance of a plan to dispose of whiskey, on which otherwise the company would take a loss, in the state of Ohio (R. 77).

On appeal, the government denied such was its theory, but one of the prime issues here is that, having proceeded upon a theory of trial focused on prime culpability of the company, that theory cannot by a mere disavowment be tossed into the discard upon review.

All three petitioners made joint and several motions for directed verdicts on all counts at the close of all the testimony (R. 147, 148). After the jury rendered a verdict of not guilty as to the corporate defendant, your petitioners made joint and several motions in arrest of judgment on all counts (R. 149, 150). The same were overruled, and the issues here are on the action by the Circuit Court of Appeals for the Seventh Circuit in affirming the action of the trial court in overruling the said motions.

THIS COURT HAS JURISDICTION.

(1) The decision of the Seventh Circuit Court of Appeals in sustaining the action of the trial judge in refusing to direct the jury to return a verdict of not guilty and in refusing to arrest judgment is apparently in conflict with applicable decisions of this court, as will be more definitely set forth hereinafter under reasons relied upon for allowance of the writ.

(2) The decision of the case by the Circuit Court of Appeals for the Seventh Circuit is also at variance with decisions of Circuit Courts of Appeals as specified hereinafter under reasons relied upon for allowance of the writ.

THE QUESTIONS PRESENTED.

The questions herein presented are:

(1) Whether, in the absence of a substantial showing by the government of the guilt of the defendants as charged and in accordance with the government's theory at trial, they are entitled to a directed verdict of not guilty and an arrest of judgment.

(2) Whether, when the conspiracy proven was not the conspiracy charged and presented at trial by the government, the trial court should have directed a verdict and arrested judgment.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

(1) The decision of the Circuit Court of Appeals is apparently in conflict with decisions of this court laid down in *Gunning v. Cooley*, 281 U. S. 90; and *Clyatt v. United States*, 197 U. S. 207.

Under these cases, petitioners aver, it appears that it was the duty of the trial court to direct a verdict of not guilty against the individual defendants as to the first 5 counts

when the government failed to submit proof of the following matters:

(a) Evidence placing ownership, sale and supply of the whiskey involved in your three petitioners;

(b) Evidence that, in the absence of the defendants at each and every sale, Rozelle was acting as agent for any of your petitioners;

(c) Evidence that any of the specific proceeds from any sale were received by any of your petitioners.

(2) For the above reasons, the decision of this case by the Circuit Court of Appeals as to the substantive counts is also at variance with the following decisions: *Hubby v. United States* (C. C. A. 5, 1945), 150 F. (2d) 165, 168; *Grantello v. United States* (C. C. A. 8, 1924), 3 F. (2d) 117, 118; *Paddock v. United States* (C. C. A. 9, 1935), 79 F. (2d) 872, 876; *Leslie v. United States* (C. C. A. 10, 1930), 43 F. (2d) 288, 290; *Towbin v. United States* (C. C. A. 10, 1938), 93 F. (2d) 861, 866.

(3) Since the evidence upon which the government based its case against these petitioners on the substantive counts was circumstantial, the decision of the case is in conflict with decisions of other Circuit Courts of Appeals prescribing it to be the duty of the trial court to instruct a jury to return verdicts for defendants unless, when there is circumstantial evidence, circumstances exclude every other hypothesis but guilt. *Nicola v. United States* (C. C. A. 3, 1934), 72 F. (2d) 780, 786; *Grantello v. United States* (C. C. A. 8, 1924), 3 F. (2d) 117, 118; *Paddock v. United States* (C. C. A. 9, 1935), 79 F. (2d) 872, 876.

(4) As the decision of the Circuit Court of Appeals related to the conspiracy count, it is apparently in conflict with the decision of the cases of *Terry v. United States* (C. C. A. 9, 1925), 7 F. (2d) 28, 30; *Ventimiglio v. United States* (C. C. A. 6, 1932), 61 F. (2d) 619, 620; *Vinciguerra*

v. *United States* and *Haning v. United States* (C. C. A. 8, 1927), 21 F. (2d) 508, 510.

Wherefore, your petitioners pray that writs of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Seventh Circuit had in the cases numbered and entitled of its docket, No. 8873, *The United States of America*, plaintiff-appellee vs. *Robert R. Hare*, defendant-appellant; No. 8874, *The United States of America*, plaintiff-appellee vs. *John M. Hare*, defendant-appellant; and No. 8875, *The United States of America*, plaintiff-appellee vs. *Clinton L. Hare*, defendant-appellant, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of the said United States Circuit Court of Appeals for the Seventh Circuit be reversed by the court, and for such further relief as to this court may seem proper.

Respectfully submitted,

Dated March 28, 1946.

ROBERT R. HARE,
JOHN M. HARE,
CLINTON L. HARE,
Petitioners,

By:

(Sgd.) DANIEL S. RING,
Daniel S. Ring,
(Sgd.) C. LEO DEORSEY,
C. Leo DeOrsey,
Attorneys for Petitioners.